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ABSTRACT

College union administrators should be careful about the use of facilities, particularly in public schools, because of the potential for legal liability. Institutions of higher education today are vulnerable to being sued in regard to issues of free speech, trespass, and religion. Areas of potential liability include (1) serving alcoholic beverages, (2) certain potentially physically harmful activities, e.g., trampolining, (3) structural hazards such as holes in athletic fields and dangerous staircases (particularly a problem when students have become inebriated), and (4) violations of First Amendment rights. The First Amendment to the U.S. Constitution, although not strongly applying to private schools, is very applicable to public schools. Attempts to restrain, for example, the exercise of free speech during demonstrations, or the banning of activities of certain religious groups must be carefully considered. Additionally, in matters of student discipline, if the institution acts irresponsibly, a violation of the Fourteenth Amendment is possible. Risk management techniques are considered necessary for all college and university administrators in avoiding legal liability. Ten suggestions are provided on improving the institution's prospects if sued. Contains 3 references. (GLR)

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Students v. union:

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As a college union administrator, your chances of having a serious legal problem are increasing, especially if you work at a public institution. Because private schools are not entities of the state, the Bill of Rights, for example, does not apply to them. Public schools, however, have to be a great deal more careful about use of facilities questions, free speech situations, trespass, and religious issues.

The decline of *in loco parentis* has increased the likelihood of legal liability. *In loco parentis* means "in the place of the parent," which is exactly how colleges and universities used to operate. They controlled all aspects of a student's life, from attendance at chapel and dress for dinner to social training and chaperoned encounters with the opposite sex. That has changed drastically. Students now have enormous freedom to engage in activities, learn as much or as little as they want, have a religious life or not, and engage in social relations with whomever they want in almost any way they want. But students are still, for the most part, quite young. Although most are legally adults, they may not be ready for the legal consequences of their actions.

Perhaps the most important reason for the rise in litigiousness is society's changing attitudes. It used to be that no one would consider suing a university or the people who work for one. Both public and private schools once had various legal immunities working for them. Now most of these either have been abolished or are being phased out, and almost every action you take in the course of your employment can precipitate legal action, and almost any action against a student can result in litigation. However, by recognizing areas of potential liability and by taking appropriate steps, you can reduce these legal risks.

Areas of potential liability

Student activities. Serving alcohol beverages exposes institutions to potential legal liability. Several factors complicate the extent of university liability for students' alcohol consumption. Alcohol consumption is not seen as an

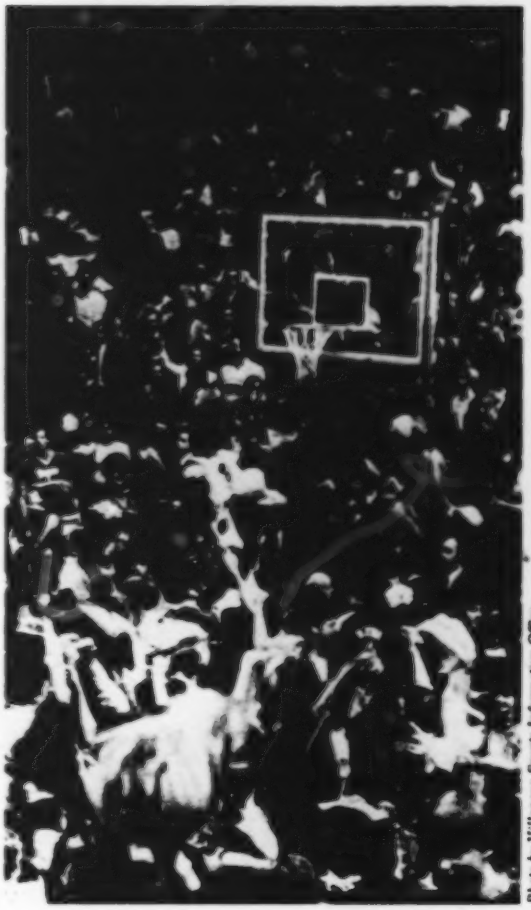

Photo by Villanova Sports Information Office

Schools must remedy unreasonable risks of harm, such as . . . sports fans running amok.

Abigail Byman

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Colleges at risk

inherently dangerous activity, and universities are not generally seen as the enforcers of state laws. However, with public concern over drunk driving, alcoholism, and fraternity and sorority hazing deaths at an all-time high, universities must carefully administer this area of student life or consciously choose not to supervise.

Dram shop statutes increase the legal risks of providing alcohol beverages. These statutes allow people injured by an intoxicated person to recover damages from the alcohol beverage provider who caused the intoxication. Negligence liability may also be based on a school's failure to conduct an activity in the way a reasonable person would. Clear rules regarding alcohol, mandating alternatives to liquor at parties and adequate supervision, can protect against negligence liability. Even if the university does not sell liquor, liability may arise from providing it.

Schools are concerned about alcohol abuse because of the potential for personal injury. The relationship of students to their college does not itself make the school liable for its students' conduct which results in injury. However, some situations do give universities a duty to control and supervise student conduct. One of those situations arises when the university acts as landlord. Schools owe a duty to "invitees," including students, to exercise reasonable care to ensure their safety on the premises. Schools must remedy unreasonable risks of harm, such as holes in athletic fields, dangerous staircases, or inebriated sports fans running amok. If an institution has exercised reasonable care and a truly unusual event happens which causes injury, then it will not be liable.

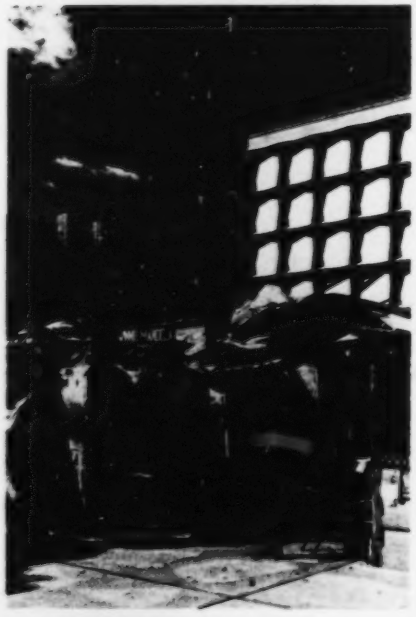
An institution also has a duty to control and supervise when the activity is inherently dangerous. Trampolining seems to be the most dangerous and most frequently litigated activity engaged in by college students. If a court finds that a university has a duty to supervise the use of a trampoline, the school may be held responsible for quadriplegia resulting from a trampolining accident.

Student facilities. The First Amendment to the U.S. Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment does not apply to private schools, and access to private school campuses, for example, can be more easily controlled by means of trespass laws. Matters of access and free speech are important concerns for public school administrators, however.

Speech can be many things: a sit-in, a demonstration, a flag displayed outside a residence hall window, or a shanty erected on campus to protest South African apartheid. When confronted with potentially disruptive speech, a public institution can make reasonable time, place, and manner restrictions. Speech may be limited to daytime, for instance, or to college unions, or to something other than screaming. Any attempt to regulate the *content* of the speech, however, probably will not be upheld by the courts. Attempts to stop First Amendment activity have often focused on political groups, from the SDS years ago to supporters of the Sandanistas today. A school should not prevent any of these groups from speaking unless they would substantially disrupt the educational process or encourage students to break university rules or civil and criminal laws.

A number of cases have helped define religious groups' access to public universities. Under the First Amendment, a university that permits recognized student groups to use university facilities for meetings must also permit religious groups to use the facilities. Public universities cannot ban all religious activities; this would amount to a prevention of free exercise of religion under the First Amendment. On the other hand, they can prohibit a student from soliciting door-to-door to increase attendance at Bible discussions, as long as all door-to-door solicitations are banned.

Photos by T. Charles Erickson, Yale University



Yale University students erected shanties to protest Yale's investments with companies doing business in South Africa (top and right). When the shanties fell victim to arson June 5, 1988, the student-run Coalition Against Apartheid responded quickly, building a 40-foot-long, 8-foot-high plywood wall June 16. The students later rejected the university's request to dismantle the wall.

Photo by Harold Shapiro, Yale University

Universities can also regulate commercial speech, such as the solicitation and sale of goods or services on campus. It is usually safer to ban commercial activity from part of the campus rather than all, particularly since universities usually have a public forum as well as more private areas. As with pure First Amendment speech, policies that reasonably restrict the time, place, and manner of commercial speech are advisable. Regulations governing commercial speech should be drafted as narrowly as possible so courts will not strike them down as overbroad.

Student discipline. Every student affairs administrator should know the legal aspects of the disciplinary process. The 14th Amendment to the U.S. Constitution reads that no state shall "deprive any person of life, liberty or property without due process of law." Most challenges to disciplinary proceedings at public schools are based on an alleged lack of due process. At the least, due process requires notice and an opportunity to be heard. As opposed to academic grievance procedures, which are inherently more subjective, public schools' disciplinary procedures require more safeguards. If very serious sanctions such as suspension or expulsion are considered, the student may have to be granted rights of confrontation and cross-examination. In certain cases, legal counsel may be permitted to participate.

As in other areas, private schools have more latitude in setting standards of behavior and writing disciplinary rules. But even private school administrators must not act in an arbitrary or capricious manner or behave in an illegally discriminatory way. Rather than thinking about constitutional due process, private school administrators should give students the process which is due them. Students should get notice of disciplinary hearings and an opportunity to be heard. No attorney need be present for either side at any hearing, and it is advisable not to allow them. Attorneys can unduly complicate and lengthen proceedings. A private school, however, must follow whatever rules do exist. If not, a court may find the action arbitrary and capricious.

Student publications. Considerable litigation over public universities' attempts to restrict student publications arose out of war protests in the late 1960s and early 1970s. Concerned about suppressing students' free speech rights guaranteed by the First Amendment, the courts ruled that state schools can control what students print only if special circumstances exist, such as the publication inciting violence or actually disrupting the educational process (*Tinker v. Des Moines Independent*

Community School District, 1969). In addition, prior restraint by advisory boards or other mechanisms is not permissible unless there are certain procedural safeguards, such as the restraint existing for the shortest possible time and a final judicial determination of the controversy (*Freedman v. Maryland*, 1965).

The U.S. Supreme Court recently dealt with censorship of a high school newspaper in *Hazelwood School District v. Kuhlmeier* (1988). The high school principal deleted two pages in one issue which, in his judgment, contained objectionable articles. The Court concluded that this case should not be governed by *Tinker*. Rather, because this student speech was an integral part of a teaching activity, school administrators should be allowed to exercise editorial control over its contents.

This case may not be fully applicable in the higher education arena because the courts generally give college students more freedom than high school students. The court's conclusion, however, is similar to the usual rule for private colleges. Because state action is not involved in their activities, private schools have more freedom of action in determining whether the content of student publications is acceptable.

Defamation is another risk publications must guard against. There are two kinds of defamation: slander, which is spoken, and libel, which is written. To establish a case of defamation, there must be language that adversely affects someone's reputation, and a third person must hear or read that language. Truth is an absolute defense to defamation actions, as is consent. One way a publication can protect itself is to get consent in writing from the person being written about.

Another major legal area for student publications is invasion of privacy, which is an unreasonable interference with an individual's solitude. A publication can invade the privacy of even a famous person by revealing truly intimate information. The purpose of the information determines whether a person's privacy has been invaded. If the purpose is to convey general information and readers have a legitimate interest in the information, there will not be invasion of privacy. Truth is not a defense to invasion of privacy actions, but consent is. If students have any reason to believe the subject of an article will seriously object to the piece, they should get his or her consent, in writing, before publication.

Student contracts. Sometimes college union administrators have to deal with the unfortunate consequences of student-made contracts. It is tempting to say that students have no authority to sign contracts for the university and should be personally liable for the ones they do sign. However, the legal principle known as apparent authority would hold the university to a contract if the party with whom the student is contracting believes the student has authority to do what he or she is doing.

Legally, a university is a person with rights as well as obligations . . . .

The university's rules for recognition or registration of student organizations should delineate the extent of those organizations' authority to contract and spell out what groups are permitted to say to third party vendors about their relationship to the university. The university should carefully control how organizations use its name, logo, and other symbols. The university should clearly state the sanctions an organization would face for obligating the university to a contract which the university neither contemplated nor would have approved. Contract management is one good reason, among many, for requiring student organizations to have advisers. Advisers can keep an eye on student contracting and establish a system of regular feedback to the university.

Risk management

All college and university administrators are responsible for risk management, particularly where students are involved. One management technique is risk avoidance, that is, prohibiting an activity so as not to have to deal with the risks it presents. For example, a university can ban trampolines because of the frequency of catastrophic injuries which they produce.

Another technique is risk control, which involves reducing losses by implementing preventive programs and managing claims against the university. This means telling students who is responsible for what activity or facility. It means good record keeping and good communication with the security department, the university's risk managers, and the university's attorneys. Perhaps the most important part of risk control is formulating clear rules and applying them consistently. Tolerating a continuing pattern of risky conduct invites liability because injury may be foreseeable and the university may be breaching its duty to prevent an injury.

The university may choose to cover the losses from particular risks, a practice known

as risk retention. Certain student activities, such as the newspaper, may involve specialized risks such as invasion of privacy or defamation, but the university may not purchase insurance to cover this risk, either consciously or unconsciously. A growing number of universities have undertaken self-insurance, a formal, funded program that covers losses to a certain dollar amount, with excess coverage purchased above that ceiling. The decision to retain risky activities without insurance should be a conscious one, and you can help by identifying risky activities within the scope of your employment.

Finally, the risk of an activity may be transferred elsewhere. We do this all the time, whether or not the risk transfer involves insurance. Students should be advised to insure their personal property in residence halls or other places on campus and told they will be held responsible for damage they cause to university property. Fraternities, in particular, should sign releases and get commercial insurance for their property. For all unusual activities, particularly off-campus, all participating students should sign releases saying they will not hold the university responsible for any personal injury or property damage. There is never a guarantee that such releases will hold up in court, but the university is always better off having them. When contracting for goods and services, be aware of who bears the risk that something will go wrong and always try to get the other party to hold the university harmless from that risk.

Avoiding legal liability

Legally, a university is a person with rights as well as obligations; in general, it has the right to take all lawful actions which are reasonable and necessary to provide quality education. The lawsuit is the ultimate means of enforcing legal rights; suing and being sued is, however, time-consuming and expensive. The following suggestions should help you, as a college union administrator, avoid litigation or substantially improve your prospects if a suit is filed.

1. Identify potential problem areas and problem persons before you take action.
2. Establish reasonable written rules and regulations which advance your department's objectives.
3. Get the facts about an occurrence or accident in writing at the earliest possible date, and distinguish facts from opinions.
4. Review existing written material, including correspondence, performance evaluations, and particularly, departmental, school, or university rules and regulations whenever there is a problem.
5. If you meet with a complainant, elicit as much information as possible, preferably in the presence of a witness, and take whatever notes you need to remember the conversation.
6. Make decisions promptly, fairly, and objectively; make a negative decision if that is clearly called for.
7. Provide personal or private information only if you know who is asking and that the information will be used for a proper purpose. Provide written personal or private information only in response to a proper, written request.
8. If an attorney or an investigator for an agency calls you, politely find out what they want and why they want it, but do not provide any answers. Call your attorneys.
9. Call your attorneys immediately if you or your staff receive legal process, a summons and complaint, a subpoena, or a notice of a complaint or investigation from a government agency.
10. In commercial matters such as contracts, read the entire document, including the fine print, before you sign or recommend signature. If the contract does not contain what was promised, change it.

These 10 steps can help you avoid litigation in the first place and improve your prospects in the event a lawsuit is filed. More importantly, you may temper students' responses to considered administrative decisions by making them aware of the legal consequences of actions you take in service to your institution, thus leading everyone to more productive pursuits.

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Freedman v. Maryland, 380 U.S. 51 (1965).
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